

Expired deposit bond held to permanently satisfy purchaser's deposit obligations before completion

Daniel Turk & Joshua Wood | September 2016 | Commercial Disputes & Transactions

Summary

The Supreme Court of NSW has found that a vendor on a contract for sale of land had no entitlement to a cash deposit from a purchaser after a deposit bond used in place of cash by the purchaser had expired.

The decision of *Parkes v Mamo* [2016] NSWSC 1129 highlights the care vendors should take to have in place contract clauses to protect themselves when unforeseen delays result in deposit bonds or other guarantees expiring before completion.

Background

Mr & Ms Parkes (the purchasers) entered into a contract with Ian Mamo (the vendor) to purchase a residential lot in a proposed plan of sub-division. The parties agreed that, upon exchange, Mr Mamo would receive a deposit bond for 5% of the purchase price.

Prior to exchange, Mr & Ms Parkes provided Mr Mamo with a pre-signed copy of the proposed deposit bond to be utilised in place of a cash deposit. Under its terms the deposit bond was to expire after six months (or upon the completion or termination of contract or the payout under guarantee, whichever came first).

This deposit bond was accepted by Mr Mamo for the deposit. The contracts for sale, in the 2005 standard edition Law Society form, were duly exchanged.

In the ensuing months, the Parkes' application for council approval to the sub-division suffered extensive delays. The

deposit bond provided by the Parkes eventually expired. Mr Mamo, purported to terminate the contract on the basis that the Parkes had not provided a replacement deposit bond/guarantee or a cash deposit payment. The Parkes wanted the sale contract to continue.

At issue before the court was whether Mr Mamo was entitled to recover a cash payment from the Parkes equal to the 5% deposit bond.

Judgment

The Court accepted (and it was common ground between the parties) that clause 2.6 of the standard contract means that, where a vendor accepts a bond or guarantee "for the deposit", the requirement to pay the deposit under clauses 2.1 to 2.5 does not apply.

The Court however went further and held that, unless the bond or guarantee itself provides otherwise, the disabling of clauses 2.1 to 2.5 is unlimited in duration. Whilst a deposit bond or guarantee does not replace the function of a deposit in every respect (the purchaser must still provide 100% of sale price on completion), as far as clauses 2.1 to 2.5 are concerned a deposit bond or guarantee takes the place of the deposit entirely.

As a consequence, when Mr Mamo accepted the deposit bond proposed by Mr & Ms Parkes, Mr Mamo gave up the right to recover the 5% in cash. Of course, his remedy was to call upon the deposit bond from the issuing institution. Unfortunately for Mr Mamo the bond had expired.

Mr Mamo was not entitled to the deposit and, consequently, had invalidly terminated the contract. As sought by Mr & Ms Parkes, the Court ordered Mr Mamo to continue the contract.

Implications

Parkes v Mamo is a timely reminder that deposit bonds have an expiry and must be called on by a vendor before expiry. Vendors should be familiar with their contract for sale terms as having accepted a deposit bond the vendor cannot later force the purchaser to pay cash.

Vendors can avoid the problem faced by Mr Mamo by ensuring that the wording of deposit bonds and guarantees they accept, cater for any foreseeable delays in the underlying contract and, where expiry periods are used, provision is made for the automatic restoration of vendor rights to a cash deposit.

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